Lai Weng Keat v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–251–10 OF 2013(A)

ARIFIN ZAKARIA CHIEF JUSTICE, RAUS SHARIF PCA, ZULKEFLI MAKINUDIN CJ (MALAYA), AHMAD MAAROP AND HASAN LAH FCJJ

27 OCTOBER 2015

Criminal Procedure — Trial — Application to hear case de novo dismissed — Third judge to preside over accused's trial on two murder charges dismissed his application to hear case de novo, ruled prima facie case made out and called for defence — Bulk of evidence of material prosecution witnesses recorded by previous judge — Whether accused materially prejudiced and denied fair trial by fact third judge did not see or hear material witnesses giving evidence and therefore could not decide on their credibility — Whether previous judge made no notation regarding demeanour of prosecution witnesses — Prosecution's case wholly based on circumstantial evidence — Whether third judge entitled to rely on evidence recorded by predecessor to decide case without de novo hearing as accused did not challenge credibility of any prosecution witness in appeal to Court of Appeal against conviction and sentence — Whether application for de novo hearing made late in the day and posed more disadvantages than advantages if it had been allowed — Whether prosecution's evidence straightforward and clear — Whether convictions safe

The instant appeal arose from the Court of Appeal's affirmation of the appellant's conviction and sentence by the High Court on two charges of murdering a woman and her boyfriend. Three judges had, at different times, presided over the appellant's trial. The first two judges had heard the testimonies of 17 out of the 18 prosecution witnesses. After hearing the last prosecution witness, the last judge to hear the case ruled that the prosecution had made out a prima facie case and he called for the defence. After hearing the defence, the judge convicted and sentenced the appellant. When the last judge took over the hearing of the matter, the appellant had applied for the case to be heard de novo on the ground it was important for the court to observe and take into account the demeanour of the prosecution witnesses when they were testifying. The trial judge did not accede to the application but allowed the appellant to recall any of the witnesses for the prosecution. The appellant did not exercise that option. The reasons for the dismissal of the de novo application were that: (a) the preceding judge had not recorded any remarks concerning the demeanour of the witnesses thereby indicating that their demeanour was not an important factor in determining their credibility; and (b) the prosecution relied on circumstantial evidence to prove its case. The

appellant's argument in the instant appeal was that he was seriously prejudiced when the last trial judge ruled there was a prima facie case without having seen and heard the material prosecution witnesses whose evidence was recorded by the second trial judge and whose evidence, the appellant contended, he had challenged as being unreliable or not credible. As a result, the appellant alleged he was denied a fair trial and he urged the instant court to set aside the conviction under the proviso to s 18 of the Courts of Judicature Act 1964 on the ground he had been materially prejudiced. The prosecution's version of the events was that neighbours, on hearing cries for help coming from a house, called police who stormed into the premises to find a man and a woman killed and the appellant hiding in a corner. Near him was a bag which contained the deceased persons' personal effects and a blood-stained knife.

Held, dismissing the appeal and affirming the convictions and sentences:

(1) The prosecution's case rested entirely on circumstantial evidence. Five of the prosecution witnesses were civilians. There were no contradictions in their evidence. Their credibility was not an issue and this was supported by the fact that in his appeal to the Court of Appeal, the appellant did not raise any issue on the credibility of those witnesses. Nine of the prosecution witnesses were police officers, two were government chemists and the last two were the consultant forensic pathologist and the assistant medical officer. Again, their credibility was not an issue before the Court of Appeal. Since the credibility of the prosecution witnesses was not an issue in this case, the last judge who presided over the trial could rely on the cold hard print of the evidence of the material witnesses recorded by his predecessors to decide the case and there was no necessity for him to have heard the case de novo (see paras 67–69).

(2) The application for the case to be heard de novo was made after the evidence of 17 out of the 18 prosecution witnesses had been heard by the trial court. It was also made about seven years after the offences were committed. After a lapse of seven years, the ability of the witnesses to recall might have diminished and to recall the witnesses after seven years would have caused unnecessary hardship to the prosecution in relocating the witnesses, been unfair to the witnesses concerned and would have unnecessarily prolonged the trial and increased the expense. The evidence put forth by the prosecution was rather straightforward and clear. There were no material inconsistencies or contradictions in the witnesses' evidence. Under the circumstances and on the facts of the case, the appellant was not materially prejudiced by the failure of the last trial judge to hear the case de novo (see paras 66 & 69).

(3) On the totality of the evidence adduced, the High Court was correct in calling for the appellant to enter upon his defence to both the charges and in convicting him after evaluating all the evidence. The convictions were safe (see para 70).

[Bahasa Malaysia summary

Rayuan ini timbul daripada pengesahan Mahamah Rayuan tentang sabitan dan hukuman perayu oleh Mahkamah Tinggi atas dua pertuduhan membunuh seorang wanita dan teman lelakinya. Tiga hakim telah, pada masa berbeza, bersidang dalam perbicaraan perayu. Dua hakim pertama telah mendengar testimoni-testimoni 17 daripada 18 saksi pendakwaan. Setelah mendengar saksi pendakwaan yang terakhir, hakim yang akhir sekali mendengar kes itu memutuskan bahawa pendakwaan telah membuktikan kes prima facie dan beliau telah memanggil untuk pembelaan. Selepas mendengar pembelaan itu, hakim mensabit dan menghukum perayu. Apabila hakim terakhir mengambil alih perbicaraan perkara itu, perayu telah memohon agar kes itu didengar *de novo* atas alasan ia penting untuk mahkamah meneliti dan mengambil kira sikap saksi-saksi pendakwaan apabila mereka memberi keterangan. Hakim perbicaraan tidak bersetuju dengan permohonan itu tetapi membenarkan perayu untuk memanggil balik mana-mana saksi untuk pendakwaan. Perayu tidak melaksanakan pilihan itu. Sebab-sebab penolakan permohonan *de novo* adalah bahawa: (a) hakim sebelumnya tidak merekodkan apa-apa kenyataan berkenaan sikap saksi-saksi yang menunjukkan bahawa sikap mereka bukan faktor penting dalam menentukan kebolehpercayaan mereka; dan (b) pendakwaan bergantung kepada keterangan mengikut keadaan untuk membuktikan kesnya. Hujah perayu dalam rayuan ini adalah bahawa dia telah diprejudiskan dengan serius apabila hakim perbicaraan terakhir memutuskan terdapat kes prima facie tanpa melihat dan mendengar saksi-saksi utama pendakwaan yang mana keterangan mereka telah direkodkan oleh hakim perbicaraan kedua dan yang mana keterangan mereka, perayu menegaskan, dia telah mencabar sebagai tidak boleh dipercayai atau tidak berwibawa. Akibatnya, perayu mengatakan dia dinafikan perbicaraan adil dan dia mendesak mahkamah ini untuk megetepikan sabitan di bawah proviso kepada s 18 Akta Mahkamah Kehakiman 1964 atas alasan dia telah diprejudiskan secara material. Versi pendakwaan tentang kejadian itu adalah di mana jiran-jiran, yang mendengar jeritan meminta tolong daripada sebuah rumah, telah memanggil polis yang menyerbu masuk ke dalam premis itu untuk menjumpai seorang lelaki dan seorang wanita dibunuh dan perayu bersembunyi di satu sudut. Berdekatannya terdapat beg yang mengandungi barang peribadi kedua-dua si mati dan pisau berlumuran darah.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Kes pendakwaan terletak keseluruhannya atas keterangan mengikut keadaan. Lima daripada saksi pendakwaan adalah orang awam. Tiada

percanggahan dalam keterangan mereka. Kebolehpercayaan mereka bukan satu isu dan ini disokong dengan fakta bahawa rayuannya kepada Mahkamah Rayuan, perayu tidak menimbulkan apa-apa isu tentang kebolehpercayaan saksi-saksi tersebut. Sembilan daripada saksi-saksi pendakwaan adalah pegawai polis, dua adalah ahli kimia kerajaan dan yang dua terakhir ialah perunding pakar patologi forensik dan penolong pembantu perubatan. Sekali lagi, kebolehpercayaan mereka bukan satu isu di hadapan Mahkamah Rayuan. Oleh kerana kebolehpercayaan saksi-saksi pendakwaan bukan satu isu dalam kes ini, hakim terakhir yang bersidang untuk perbicaraan itu boleh bergantung kepada keterangan cetak keras daripada keterangan saksi-saksi material yang direkodkan oleh hakim sebelumnya untuk memutuskan kes itu dan tidak ada keperluan untuk beliau mendengar kes *de novo* (lihat perenggan 67–69).

(2) Permohonan untuk kes didengar *de novo* telah dibuat selepas keterangan 17 daripada 18 saksi pendakwaan didengar oleh mahkamah perbicaraan. Ia juga telah dibuat lebih kurang tujuh tahun selepas kesalahan-kesalahan itu dilakukan. Selepas tempoh tujuh tahun, keupayaan saksi-saksi untuk ingat semula mungkin telah berkurangan dan untuk memanggil semula saksi selepas tujuh tahun akan menyebabkan kesukaran yang tidak perlu untuk pendakwaan dalam mencari semula saksi, tidak berlaku adil kepada saksi-saksi yang berkenaan dan sepatutnya tidak perlu melanjutkan perbicaraan dan meningkatkan perbelanjaan. Keterangan yang dikemukakan oleh pendakwaan agak mudah dan jelas. Tiada apa-apa ketidakseragaman atau percanggahan material dalam keterangan saksi. Dalam keadaan dan fakta kes, perayu tidak diprejudiskan secara material oleh kegagalan hakim perbicaraan terakhir untuk mendengar kes itu *de novo* (lihat perenggan 66 & 69).

(3) Berdasarkan keseluruhan keterangan yang dikemukakan, Mahkamah Tinggi adalah betul dalam memanggil perayu untuk membuat pembelaannya terhadap kedua-dua pertuduhan dan dalam mensabitkannya selepas meneliti semua bukti. Sabitan itu adalah selamat (lihat perenggan 70).]

Notes

For cases on trial in general, see 5(3) *Mallal's Digest* (5th Ed, 2015) paras 5457–6104.

Cases referred to

Abdul Hamid bin Udin v PP [2000] 6 MLJ 334, HC (refd)

Gunasekaran a/l Buchia lwn Pendakwa Raya [1994] MLJU 9; [1995] 2 CLJ 397, HC (refd)

Mohamed Anuardin bin Abdul Salam & Anor v Pendakwa Raya [1996] 3 MLJ 298, HC (refd)

A *Mohamed Idris bin Haji Mohamed Said v Rex* [1949] 1 MLJ 31 (refd)
Mohd Shukur bin Hassan & Anor v PP [2004] 2 MLJ 601, HC (refd)
Oh Keng Seng v PP [1976] 1 MLJ 143 (refd)
Pendakwa Raya lwn Mohamed Azmin Ali [2000] MLJU 496; [2000] 7 CLJ 628, HC (refd)
B *PP v Mohd Jon* [1993] 1 MLJ 133, HC (refd)
PP v Kulasingam [1974] 2 MLJ 26 (refd)
Ranjit Singh a/l Jit Singh v PP [2012] 6 MLJ 316; [2012] 10 CLJ 128, CA (refd)
Teay Wah Cheong v PP [1964] 1 MLJ 21 (refd)
C

Legislation referred to

Courts of Judicature Act 1964 s 18, 18(2), (2)(a)(ii), (3)
Criminal Procedure Code ss 261, 261(a), 271
D Dangerous Drugs Act 1952 ss 12(2), 39B(1)(a)
Penal Code ss 302, 304A, 409
Prevention of Corruption Act 1971
Road Traffic Ordinance No 49 of 1958 s 34(A)(1)
Sedition Act 1948 s 4(1)(b)
E Straits Settlement Criminal Procedure Code [SG] s 254

Appeal from: Criminal Appeal No A-05–15–01 of 2013 (Court of Appeal, Putrajaya)

F *Choong Joo Tian (J T Chong Assoc) for the appellant.*
Azlina bt Rasdi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hasan Lah FCJ (delivering judgment of the court):

G

[1] The appellant was tried before the High Court on two charges of murder and was convicted on both the charges. The decision of the High Court was affirmed by the Court of Appeal. The appellant now appeals against his convictions and sentences to this court.

H

[2] The charges preferred against the appellant are that he between 9.30pm on 5 July 2005 and 12.40am on 6 July 2005 at No 49, Jalan 1, Taman Tasek Indah, Kemunting, Daerah Larut Manjung and Selama, Perak had murdered Wong Mun Kin and Kong Poh Chooi, an offence under s 302 of the Penal
I Code.

[3] The background facts of the case are as follows. The trial was conducted by three different judges at different times. Justice Zakaria Sam heard three witnesses for the prosecution from 2–3 September 2008. They are PW1 and

PW2, the police photographers and PW3, the store supervisor.

[4] The trial was continued by Judicial Commissioner Ridwan Ibrahim from 2 August 2010–22 February 2012, who heard evidence from 15 witnesses for the prosecution. They are PW3–PW17.

[5] On 14 February 2012 the appellant informed the court that he no longer wanted to use the service of his defence counsel Dato' Naran Singh, as he wanted to get a new counsel. Dato' Naran Singh was therefore discharged by the court. On 6 April 2012 the court appointed Mr Ranjit Singh as the new defence counsel for the appellant.

[6] From 30 March–18 May 2012 the case was mentioned before Judicial Commissioner Teo Say Eng. No evidence was heard by the court during that period.

[7] From 23 July–20 December 2012, the trial was continued by Judicial Commissioner Ahmad Nasfy Hj Yasin, who heard the last witness for the prosecution, PW18, the Director of Forensic Division, Department of Chemistry Centre.

[8] After hearing the defence, Justice Ahmad Nasfy held that the prosecution had proved its case beyond reasonable doubt against the appellant on both the charges.

[9] The relevant facts of the case as presented by the prosecution at the trial are as follows. Both the deceased stayed in the house at No 49, Jalan 1, Taman Tasek Indah, Kamunting, Perak ('the house'). Wong Mun Kin was the boyfriend of Kong Poh Chooi.

[10] On 5 July 2005 at about 11.45pm, V Sivananthan a/l Vello ('PW7'), who stayed at house No 55 heard a female voice coming from the house shouting 'minta tolong, pencuri' and 'pencuri dan thief'. PW7 then went to the house and when he arrived there he saw Abdul Rahman bin Din ('PW6'), who was a guard, there.

[11] According to PW6 on that date, at about 11.50pm he was on duty as a guard in that housing estate. He heard a female voice shouting from one of the houses in Jalan Satu. He then went to the place. Upon arrival he saw three to four persons near the house. PW7 then told him to go to the rear portion of the house. While PW6 was on his way he heard a groaning sound from the top floor of the house. He did not see anyone behind the house.

[12] A few minutes later he saw a figure inside the house. PW6 waited there until the police arrived.

[13] Meanwhile PW7, who was waiting at the front gate of the house, also heard someone moaning in pain from the top of the house. PW7 called the police.

[14] At about 11.40pm ASP Hilmi bin Ahmad ('PW9') received information that there was a house breaking at the house. He and his men went to the house. At the house he saw a group of people there. From outside of the house PW9 could see a male person walking inside the house. That person was holding a bag in his left hand. PW9 also saw a body lying on the floor.

[15] At about 12.15am PW9 decided to enter the house. As the door of the house was locked, PW9 broke the glass window at the kitchen to enter the house. Once inside PW9 then opened the main door of the house to allow his men to enter the house. After his men entered the house PW9 closed and locked the main door.

[16] On the ground floor PW9 and his team found a body, with hands and legs tied, lying on the floor. PW9 and two of his men went up to the top floor of the house. From one of the rooms he could see a body of a female person lying at the balcony. The body was covered with blood.

[17] PW9 also saw a person (later identified to be the appellant) hiding behind the air conditioner compressor as shown in photograph P4(X). Upon seeing PW9 and his men the appellant asked PW9 to shoot him. The appellant was then apprehended and handcuffed by PW9. PW9 found a black bag ('P17A') at the place where the appellant was hiding. Upon inspection, PW9 found that the female person was already dead.

[18] Inside P17A PW9 found, among others, credit cards and identification cards belonging to the two deceased. Also found inside the bag were a Samsung handphone, a bunch of keys and a Mercedez car key, a bracelet stained with blood, a bloodstained knife, wallets, a bloodstained glove, a piece of bloodstained cloth and a wristwatch.

[19] Dato Dr Bhupinder Singh ('PW17'), a consultant forensic pathologist, carried out the post-mortem examinations on the two bodies at the Hospital Taiping. From the external examination of the body of Wong Mun Kin, PW17 found 15 injuries on the deceased's body and from the internal examination of the body PW17 found, inter alia, the right cornu of the thyroid cartilage was fractured with marked haemorrhage surrounding it. The ribcage showed fractures of the left first to the sixth ribs. In PW17's opinion the cause of death

of Wong Mun Kin was 'Asphyxia due to pressure on the neck'.

[20] With regard to the body of Kong Poh Chooi, PW17 found 20 injuries. From internal examination of the body, PW17 found the following injuries:

(a) subarachnoid haemorrhage was seen over the right occipitio temporal region;

(b) the incisors were fractured;

(c) multiple stab wounds were seen penetrating the left sternocleido-mastoid muscle with marked haemorrhage seen in the surrounding area;

(d) a stab wound on the front of the neck had penetrated the oesophagus and the trachea;

(e) the sixth cervical vertebra had been penetrated and fractured;

(f) the left internal jugular vein had been cut; and

(g) factures of left fifth to seventh ribs. The stab wounds had penetrated between fifth and sixth ribs into the chest cavity. One of the stab wounds had penetrated the pericardium and gone into the heart over the right ventricle causing a haemopericardium.

In PW17's opinion, the cause of death of Kong Poh Chooi was 'multiple stab wounds'.

[21] Mr Lim Kong Boon ('PW18'), the Director of Forensic Division, Department of Chemistry Centre, Petaling Jaya, confirmed that he received 41 exhibits from ASP Seah Chong Seng ('PW13'), the investigating officer for the case on 12 October 2005. PW18 was asked to carry out examination and analysis for the presence of the biological evidence on the exhibits and to carry out further DNA analysis if the biological evidence was detected. PW18, inter alia, found that the blood stains on the knife and the glove belonged to both the deceased.

[22] At the close of prosecution's case, the trial judge was satisfied that a prima facie case had been established against the appellant on both the charges and called the appellant to enter upon his defence.

[23] In his defence, the appellant testified that on that day while he was jogging at Taman Lake View he heard voices asking for help. He then went to the house to see what happened. Upon arrival at the house he saw someone running out of the house. He then went into the house as the door was not locked.

[24] Inside the house, he saw a body covered with blood lying on the floor. The appellant then locked the door. He then went upstairs. He saw a man on the verandah of the house. When he was at the verandah he saw another body also covered with blood lying on the floor. At the same time he saw someone jumping down from the top floor of the house.

[25] At about the same time he heard the door of the house was being forced open. A few persons rushed towards him and ordered him to surrender. He was arrested by the police. He denied that he told the police to shoot him before he was arrested by the police.

[26] Before us, learned counsel for the appellant primarily directed his submission on the manner the trial was conducted in the High Court. Despite the fact that Justice Ridwan Ibrahim heard the evidence of most of the prosecution witnesses, it was Justice Ahmad Nasfy who made the decision that the prosecution had succeeded in proving a prime facie case against the appellant and later at the end of the trial decided that the prosecution had proved its case beyond reasonable doubt.

[27] During the trial, an application was made before Justice Ahmad Nasfy by the new counsel for the appellant for the case to be heard de novo on the ground that it was also important for the court to take into consideration the demeanour of the witnesses for the prosecution when giving evidence pursuant to s 261 of the Criminal Procedure Code. That application was opposed by the learned deputy public prosecutor.

[28] The application for the case to be heard de novo was dismissed by Justice Ahmad Nasfy. At the same time Justice Ahmad Nasfy informed learned counsel for the appellant that the appellant was allowed to recall any witnesses for the prosecution. However the defence decided not to recall any of them. The court gave the following reasons for dismissing the application for the case to be heard de novo:

(a) the preceding trial judge did not record his remarks respecting the demeanour of the witnesses pursuant to s 271 of the Criminal Procedure Code while under examination at the conclusion of their evidence which indicated that the demeanour of those witnesses was not an important factor in determining their credibility; and

(b) the prosecution relied on the circumstantial evidence to prove its case and the material witnesses for the prosecution were the police officers namely PW6, PW9 and PW13.

[29] It was therefore submitted that in the circumstances of the case, the appellant had been seriously prejudiced when Justice Ahmad Nasfy decided

that there was a prima facie case without having seen and heard the relevant material witnesses for the prosecution (such as PW6, PW7, PW8, PW9 and PW13).

[30] Learned counsel for the appellant further submitted that Justice Ahmad Nasfy had failed to direct his mind to the provision of s 18(2) of the Courts of Judicature Act 1964 in making his decision to reject the appellant's application for the trial to be heard de novo on the ground that he was also directed/instructed to continue the trial under s 261 of the Criminal Procedure Code. It was the contention of learned counsel for the appellant that in rejecting the appellant's application for the case to be heard de novo Justice Ahmad Nasfy had also failed to take into account the legal principles in the following cases:

(a) *Mohamed Idris bin Haji Mohamed Said v Rex* [1949] 1 MLJ 31;

(b) *Teay Wah Cheong v Public Prosecutor* [1964] 1 MLJ 21;

(c) *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26;

(d) *Oh Keng Seng v Public Prosecutor* [1976] 1 MLJ 143;

(e) *Public Prosecutor v Mohd Jon* [1993] 1 MLJ 133;

(f) *Gunasekaran a/l Buchia lwn Pendakwa Raya* [1994] MLJU 9; [1995] 2 CLJ 397; and

(g) *Mohd Shukur bin Hassan & Anor v Public Prosecutor* [2004] 2 MLJ 601.

[31] Learned counsel for the appellant also submitted that Justice Ahmad Nasfy further erred in facts and in law when he rejected the appellant's application for the trial to be heard de novo for the following reasons:

(a) the evidence of the first 17 prosecution witnesses was not of a 'formal character' as the credibility and reliability of some of the material prosecution witnesses (such as SP6, SP7, SP8, SP9 and SP13) have a material bearing on the outcome of this case;

(b) the appellant was facing a serious charge of murder under s 302 of the Penal Code which carries mandatory death sentence upon conviction;

(c) there was no suggestion by the DPP during the trial that the de novo rehearing of the case would cause any 'unnecessary hardship or great inconvenience' to the accused or any of the witnesses or would incur any 'unreasonable expenditure'. In any event it was submitted that in a case involving the capital punishment these could be the least consideration in determining whether the case should be heard de novo. What was important is that the prosecution's material witnesses must be seen and

heard by the trial judge himself before he can make any decision whether a prima facie case had been made out;

(d) the provision in s 18(2) of the Courts of Judicature Act 1964 empowering the High Court to continue with the trial from the stage where the previous judge left must be exercised with caution as there is a real risk that material evidence not recorded by the subsequent judge but which was acted upon by him would materially prejudice the appellant. It was submitted that in the circumstances of this case, the decision of the succeeding judge in rejecting the application for the case to be heard de novo had in fact materially prejudiced the appellant;

(e) in this case, the credibility and reliability of the testimony of some of the material prosecution witnesses (such as SP6, SP7, SP8, SP9 and SP13) were challenged by the defence counsel during cross-examination as they were inconsistent with the testimony given by the appellant at the defence stage. The succeeding judge could not make a maximum evaluation of such prosecution evidence without having first heard and seen the witnesses; and

(f) under such circumstances, it cannot be said that the appellant had a fair trial as the succeeding judge had merely relied on the 'cold hard print' of the evidence of material witnesses recorded by the previous judge in arriving at his decision that a prima facie case was made out against the appellant.

[32] Finally, it was submitted that even if Justice Ahmad Nasfy had rightly exercised his discretion in deciding to continue with the trial under s 18(2) of the Courts of Judicature Act 1964, the learned judicial commissioner should have also exercised his discretion under s 18(3) of the Courts of Judicature Act 1964 by recalling some of the material prosecution witnesses before he could determine whether a prima facie case had been made out against the appellant. Under the circumstances, learned counsel for the appellant urged this court to invoke the proviso to s 18 of the Courts of Judicature Act 1964.

[33] In response, learned deputy public prosecutor submitted that on the facts of this case, the demeanour and credibility of the witnesses for the prosecution was not in doubt. The material witnesses for the case were the police officers and they were credible witnesses.

[34] We will begin our deliberation on the issue by looking at the cases cited by learned counsel for the appellant and other cases related to the issue. In *Mohamed Idris bin Haji Mohamed Said v Rex* the appellant was charged for theft. The appellant was employed as a clerk by the Singapore Harbour Board. A detective saw him carrying various articles, including a bottle of gin, a lady's handbag, two tins containing cake and four tubes of toothpaste. The evidence

showed that it would be within the scope of his duties to collect things of that kind, if he found them lying about, and place them in proper custody. The whole question of whether the appellant was guilty of stealing the goods in question depended on the inference the court could draw from the circumstances in which the detective found the appellant carrying, whether the appellant had concealed them on his person, or whether he had put various articles inside his shirt.

[35] The magistrate who had begun the hearing of the case left and another magistrate continued the hearing. The question was whether the new magistrate should exercise the powers given under s 254 of the Straits Settlement Criminal Procedure Code (which is in pari materia with s 261 of our Code) and act on the evidence recorded by his predecessor. The new magistrate decided to act on evidence recorded by his predecessor. On appeal a new trial was ordered by the High Court. In his judgment Murray-Aynsley CJ opined:

> ... The power given under the section is of value, particularly when it is used for evidence of a more or less formal character, or where the witness cannot be produced. In the present case the witness whose evidence was so acted on was a crucial one, and I cannot think that a decision can be regarded as satisfactory where it is based on evidence given before another magistrate, particularly when there is nothing to prevent the witness from giving evidence on the further hearing.

[36] In *Teay Wah Cheong v Public Prosecutor* the accused was charged under s 304A of the Penal Code. He was found guilty, convicted and sentenced to two weeks imprisonment and fined RM500. In this case a president of the sessions court recorded evidence of the eight witnesses. He was then succeeded by the new president of the sessions court. The succeeding president recorded further evidence and came to a finding. In his grounds of judgment the learned president stated that there was in fact only one eyewitness to the accident, presumably the wife of Abdul Salam whose evidence was recorded by the succeeding president. However the whole record shows there were two other eyewitnesses whose evidence was recorded by his predecessor. In allowing the appeal by the accused, Hashim J at p 22, had this to say:

> ... unless it would cause hardship and great inconvenience to the accused person and witnesses I think it is much better for a president or a magistrate to hear the case ab initio rather than take over the recording of evidence from the other president or magistrate. For one thing the succeeding president or magistrate cannot assess the value of the evidence recorded by his predecessor vis a vis the credibility of the witness.

[37] In *Oh Keng Seng v Public Prosecutor* the applicant was accused of uttering seditious words under s 4(1)(b) of the Sedition Act 1948 on 1 March 1974. He was charged in the sessions court. The trial had so far lasted six days

over a period of about a year and two months. A total of 12 prosecution witnesses had completed their testimony and the 13 and last witness for the prosecution was in the box waiting to be cross-examined by the defence after having completed his evidence-in-chief.

[38] When the case came up for further hearing on 5 May 1975 the president of the sessions court had already been posted to Kedah as a deputy public prosecutor and before any evidence was recorded on that day learned counsel for the applicant objected to the said president of the sessions court hearing the case any further but his objection was overruled.

[39] The applicant moved the High Court for an order that the said president of the sessions court be precluded from continuing the hearing of the case and a further order that the case be heard de novo by the succeeding president. Among the reasons given by the applicant to support his application was that he might not get a fair trial if the case was continued by the said president of the sessions court. It was also alleged that the transfer of the said president of the sessions court to the post of deputy public prosecutor was in effect an abrogation of his previous post as president of the sessions court. It was further alleged that there was a real likelihood of the said president of the sessions court being biased and that it would be contrary to public policy and natural justice if the said president of the sessions court preside over that matter as that would impose on him the dual role of prosecutor as well as the presiding officer of the same court at one and the same time. That would be embarrassing to the said president of the sessions court and would be prejudicial to a fair trial.

[40] In its judgment the High Court made the following observation at pp 144–145:

> The provision in s 261 of the Criminal Procedure Code which empowers the succeeding magistrate or president to act on the evidence recorded by his predecessor is no doubt intended to save time and money and to expedite the disposal of part-heard criminal cases. This provision however should be exercised with caution. It must be appreciated that the succeeding magistrate or president who acts on the evidence of witnesses whom he has not heard and seen is obviously at some disadvantage particularly in respect of the demeanour and credibility of those witnesses. There is therefore a real risk that evidence not wholly recorded by a magistrate or president but which is acted on by him may materially prejudice an accused person where a decision involving the credibility of a witness is based on that evidence. The provision however may generally be exercised where the evidence to be acted on is more or less formal or is largely uncontroversial and where the credibility of any material witness is not involved ...
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> ...
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> The applicant is charged with uttering seditious words. By the very nature of the charge the credibility of witnesses is bound to be of paramount importance and I do

not think that this is a proper case where the present president of the sessions court may continue from where it was left by his predecessor and act on the evidence already recorded. Furthermore all the 13 prosecution witnesses are readily available to give evidence. The hearing by the previous president lasted only six days and I do not think that a new trial will result in much loss of time and expense.

[41] In *Public Prosecutor v Mohd Jon* the accused was charged with trafficking in dangerous drug under the Dangerous Drugs Act 1952 and the former trial judge, who had since retired, ruled that there was no case for the accused to answer at the close of the prosecution's case. On the prosecution's appeal, the then Supreme Court ordered that the defence be called. The prosecution contended that the succeeding judge should continue from the defence stage. The defence, however, objected to the continuation of the hearing from the defence stage because firstly the order of the Supreme Court was not clear and there was no formal order in writing issued and secondly, the present trial judge would be very much at the disadvantage of not having the means to assess the demeanour of the witnesses so far called.

[42] The High Court ordered the trial to be heard de novo. In its judgment the High Court made the following observation at p 137:

The learned deputy is mainly concerned with the delay and the expenses if a fresh trial is ordered. I have perused the notes of the evidence and in my view, there are at least six material witnesses (that is the first six witnesses) whose veracity should be given material consideration before coming to any conclusion on the issues of fact in the instant case. Further, in recalling these witnesses, I do not think that the exercise should be merely to observe their appearances or to question them if they were telling the truth when they gave their previous evidence. The exercise should be more than that. It should be done so as to enable the succeeding court to observe their demeanour in the usual course of giving evidence. As such, in my view, the avoidance of delay and expenses would be outweighed by the risk of prejudice or failure of justice that might occasion to the accused in the instant case.

Further, I find that in the several reported cases which dealt with s 261 of the Code, the primary consideration was to ensure that the evidence recorded should be properly evaluated including the credibility of the witnesses who had testified. I find no reason to disregard the common principle enunciated in those cases in considering the present case.

[43] In *Gunasekaran a/l Buchia lwn Pendakwa Raya* the appellant was convicted of an offence of dangerous driving under s 34(A)(1) of the Road Traffic Ordinance No 49 of 1958. The trial started on 23 December 1991 before a magistrate who heard evidence from three prosecution witnesses comprising of a cyclist who was involved in the accident, the deceased's mother and the investigation officer.

[44] When the case came up for continuation of hearing the magistrate had been transferred. The succeeding magistrate, even though after being informed by both parties that the case was ordered to be heard de novo by 'Mahkamah Agung', decided to continue the trial of the case pursuant to s 261 of the Criminal Procedure Code. At the conclusion of the case for the prosecution the appellant was called to enter his defence. The appellant elected to remain silence. He was found guilty and convicted.

[45] In the appeal before the High Court learned counsel for the appellant submitted that there were numerous contradictions in the evidence of the deceased's mother and the identity of the post-mortem report tendered in court was unsatisfactory. The issue for determination in the High Court was whether the decision of the succeeding magistrate to continue the trial without hearing the evidence of an important witness for the prosecution was proper and whether the appellant ought to be ordered to enter his defence.

[46] In allowing the appeal, the High Court held that the discretion to be exercised under s 261 of the Criminal Procedure Code ought to be exercised in exceptional cases only to ensure that the appellant was not prejudiced by the decision of the succeeding magistrate not to rehear the witnesses. Since the evidence of the cyclist was crucial to the decision of the succeeding magistrate it was therefore necessary for the succeeding magistrate to rehear the evidence of that witness. The decision of the succeeding magistrate had therefore prejudiced the appellant.

[47] At p 401 of the report, the High Court said:

> Saya bersetuju sepenuhnya dengan pandangan kedua-dua yang arif hakim tersebut di mana pendekatan yang diambil terhadap s 261 KAJ ialah dari sudut yang negatif. Ini bermakna bahawa budibicara yang hendak dilaksanakan dibawah seksyen tersebut hendaklah dilaksanakan sebagai satu pengecualian. Dalam lain perkataan hanya dalam keadaan luar biasa sahaja patut digunakan budi bicara untuk menyambung sesuatu perbicaraan yang telah dimulakan terdahulu oleh seorang majistret yang lain tanpa mendengar semula saksi-saksi penting yang telah memberi keterangan. Pada pendapat saya keadaan luar biasa tersebut tidak boleh dihuraikan disini secara terperinci. Terpulanglah kepada seseorang majistret untuk menentukan keperluan untuk sambung bicara atau membicara semula dari awal sesuatu kes itu, berlandaskan kepada fakta sekeliling kes tersebut dengan mengambil kira agar keputusan yang dibuat tidak mendatangkan prejudis terhadap tertuduh. Dalam melaksanakan budi bicara ini, seseorang majistret juga diingatkan kepada kewajipan yang diberi oleh mendiang Laville J dalam kes rayuan *Chong Kwee Hian v Public Prosecutor* [1948] 14 MLJ 191 yang pada pendapat saya masih terpakai. Yang Arif Hakim tersebut menasihatkan:
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> > Section 261, however, gives the court in my opinion complete discretion in the matter and it is always very highly desirable that judgment should be given in any

> case by a magistrate who has heard and recorded all the evidence himself and has seen and heard all the witnesses.
>
> Kembali kepada kes dihadapan saya, keputusan majistret kedua yang arif untuk menyambung perbicaraan tanpa mendengar semula keterangan saksi-saksi penting yang perlu dinilai, adalah tidak tepat berdasarkan prinsip-prinsip yang telah dihuraikan dalam keputusan kes-kes yang disebutkan diatas.

[48] In *Mohd Shukur bin Hassan & Anor v Public Prosecutor* the two appellants were charged with the offence of statutory rape. The trial was initially conducted by a sessions court judge who heard the entire prosecution's case and then called upon both the appellants to enter their defence. He heard the first appellant's evidence and mid-way through hearing the evidence of the second appellant he ceased to carry on with the trial as he was suspended as a result of being charged for an offence. The case was continued and completed by another sessions court judge. The appellants were found guilty and sentenced to ten years imprisonment with five strokes of *rotan* each.

[49] Dissatisfied with that decision they appealed to the High Court. One of the issues argued in the appeal was whether s 261 of the Criminal Procedure Code had been rightly invoked by the succeeding sessions court judge in this case.

[50] In allowing the appeal and ordering a retrial, the High Court at p 606 held:

> I agree with this proposition of the law. Since this case relates to charges involving statutory rape, it is all the more important and relevant for the final arbiter to be in a position to weigh the evidence taken together with considerations of demeanour and the general conduct and management of the witnesses in court, especially the complainant. Deprived of the opportunity of availing himself of such considerations, it cannot be said that both the accused have had a fair hearing before the second judge who merely had the opportunity to see words in cold hard print.

[51] All the cases referred to above seem to suggest that where the demeanour and credibility of the witnesses who had given evidence earlier were crucial or became an issue, the succeeding magistrate or judge had to hear the case de novo or recall the relevant witnesses to ensure that the succeeding magistrate or judge was able to assess personally the demeanour and credibility of the relevant witnesses. This is because the succeeding magistrate or judge who acted on the evidence of witnesses whom he had not heard and seen was obviously at some disadvantage particularly in respect of the demeanour and credibility of those witnesses. There was therefore a real risk that the accused might be materially prejudiced under the circumstances.

[52] On the other hand, there are cases which held that the succeeding magistrate or judge need not hear the case de novo and could act based on the cold hard print of the evidence. This is more so where the facts of the case were straightforward and the credibility of the witnesses were not crucial.

[53] In *Public Prosecutor v Kulasingam* the accused was charged for an offence under s 409 of the Penal Code. The prosecution case commenced on 15 June 1971. After a protracted hearing of 27 prosecution witnesses who produced 98 exhibits the defence was called on 20 September 1972. The first defence witness was called to give evidence on 26 January 1973. The president of the sessions court who originally tried the case was transferred to be a deputy public prosecutor. The succeeding president made an order for the case to be tried de novo. When the case came up for continuation before another president the learned deputy public prosecutor suggested that the case be continued under s 261 of the Criminal Procedure Code. Defence counsel objected. The matter came before the High Court for revision.

[54] Hashim Yeop A Sani J (as he then was) had this to say:

> Section 261 of the Criminal Procedure Code provides that whenever any magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself. The purpose of this section is to prevent a re-hearing in certain cases where a re-hearing will result in unnecessary hardship or injustice or unreasonable expenditure subject always to the guarantee as provided in proviso (a) that the accused may demand any witnesses to be re-summoned or re-heard.
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> The present case is a case in point having regard to the large number of witnesses already called and given evidence and the large number of exhibits already tendered. The difficulty in this case is only that a finding of guilt had already been made by the original president and he had also proceeded to record the evidence of the first defence witness; but this difficulty is not insurmountable. Section 325 of the Criminal Procedure Code allows the High Court in its discretion to exercise any of the powers conferred by s 316 of the Criminal Procedure Code. The order of the original president on the finding of guilt is in my view an 'order' within the meaning of s 316(c). In the exercise of my revisionary powers I order that the trial of this case be continued under the provision of s 261 of the Criminal Procedure Code on the following terms. To enable that justice may be had the order of calling for the defence made on 20 September 1972 is set aside; the record of evidence of first defence witness be expunged from the records, and the orders of 'trial de novo' made on 21 September 1973 and 29 January 1974 are set aside.

[55] In *Abdul Hamid bin Udin v Public Prosecutor* [2000] 6 MLJ 334 the appellant was charged under s 12(2) of the Dangerous Drugs Act 1952. The appellant was found guilty as charged and was sentenced to six years'

imprisonment and ten strokes of the *rotan*. In his appeal to the High Court, one of the grounds canvassed was that on the basis of s 261 of the Criminal Procedure Code the appellant was materially prejudiced because the prosecution case and the defence case was heard before different sessions judges.

[56] In his judgment the learned High Court judge opined at pp 344–345 as follows:

> It is unfortunate the remarks were made on general principles only, and we do not have the benefit of a close consideration of s 261. The facts in *Teay Wah Cheong v PP* is in any case distinguishable from the instant case where the same judge had heard the entire prosecution case and had called for the defence. Although it is true that the succeeding judge would have to consider all of the evidence at the end of the case, it cannot be said the accused was ipso facto materially prejudiced, particularly where the accused, represented by counsel, had not in any case demanded the witnesses or any of them be re-summoned and re-heard. In the absence of such objection, the argument that the fact the succeeding trial judge did not see the demeanour of the witnesses is a fatal flaw, lacks merit, and from a detailed review of the record of appeal and as set out below, I find the argument unsustainable on the facts.

[57] In *Mohamed Anuardin bin Abdul Salam & Anor v Pendakwa Raya* [1996] 3 MLJ 298 both the appellants were charged under the Prevention of Corruption Act 1971. The trial had reached a stage where the prosecution had called 13 witnesses by the time the succeeding sessions court judge took over the proceedings. The succeeding judge, in exercising his discretionary power under s 261 of the Criminal Procedure Code, ordered the case be continued by him from the point where it had been left, and not de novo. The appellants appealed against the ruling. In dismissing the appeal the High Court, inter alia, held that to hear the case de novo would not be the best course to adopt as the ability of the witnesses to recall events may have diminished with a lapse of six years. It would also unnecessarily prolong the trial and increase the expense.

[58] In *Pendakwa Raya lwn Mohamed Azmin Ali* [2000] MLJU 496; [2000] 7 CLJ 628, the respondent was discharged and acquitted in the sessions court at the close of the prosecution case. Upon an appeal by the public prosecutor, the High Court ruled that the prosecution had made out a prima facie case and ordered that the respondent enter on his defence. The case was remitted to the sessions court for continued trial. In the sessions court, the respondent demanded to recall a prosecution witness under s 261(a) of the Criminal Procedure Code. The sessions court judge allowed the recall.

[59] The issue for revision before the High Court was whether the demand to recall the witness under s 261 was proper. In its judgment the High Court,

at pp 638–639, had this to say:

> In as much as an appellate court is not precluded from departing from the findings of fact of a trial judge simply because the former had not seen the witnesses, so also a succeeding magistrate is not precluded from making findings of fact from notes of evidence even entirely not recorded by him. If there is apprehension that demeanour is important in the assessment and consideration of the evidence of the witness because it affects credibility of the particular witness, and for which the record is inadequate, that reason must be given and made out because that is the purpose of the first proviso of s 261. The first proviso of s 261 was not enacted to give an unfettered right to demand re-summoning and re-hearing of a witness merely because there is a different magistrate but to ensure that the second magistrate is able to assess personally the demeanour and credibility of the particular witness and to weigh his evidence accordingly.

[60] In *Ranjit Singh a/l Jit Singh v Public Prosecutor* [2012] 6 MLJ 316; [2012] 10 CLJ 128 the appellant was sentenced to death by the High Court after being found guilty of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952. Two witnesses for the prosecution, PW1 (the raiding officer) and PW2 (the government chemist) testified before the first High Court judge. The trial was then continued before the succeeding High Court judge.

[61] In his appeal to the Court of Appeal the appellant, inter alia, contended that the second High Court judge who had continued with the hearing of the trial after the first judge was transferred could not have exercised maximum evaluation of the evidence of PW1 and PW2 because their evidence was recorded, and their demeanour when testifying was observed, by the first judge.

[62] In dismissing the appellant's contention, the Court of Appeal held that the second judge, in keeping with s 18(2)(a)(ii) of the Courts of Judicature Act 1964, had clearly acted upon the evidence as partly recorded by the first judge and partly by himself. There was no necessity for the second judge to have looked at PW1's demeanour to anchor liability on the appellant. The facts were straightforward and the notes of evidence spoke a thousand words. The judge was not concerned about the demeanour of PW1 and PW2 but about the cold print of their evidence.

[63] The latter category of cases seem to suggest that in exercising its discretion under s 261 of the Criminal Procedure Code and s 18(2) of the Courts of Judicature Act 1964, the court had taken into consideration other factors, namely:

(a) whether it was more appropriate for the relevant witnesses to be re-heard rather than the whole case to be heard de novo;

(b) the large number of witnesses already called and given evidence and the large number of exhibits already tendered;

(c) whether the facts of the case are straightforward;

(d) the ability of the witnesses to recall events may have diminished with a lapse of time;

(e) it would unnecessarily prolong the trial and increase the expense; and

(f) unnecessary hardship to the prosecution and the witnesses.

[64] It is to be noted that all the High Court cases referred to above dealt with s 261 of the Criminal Procedure Code. Only in *Ranjit Singh a/l Jit Singh* the Court of Appeal dealt with s 18(2) of the Courts of Judicature Act 1964. The two provisions are substantially similar in nature. For ease of reference the two provisions are reproduced below.

Section 261 of the Criminal Procedure Code provides:

> 261 Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:
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> Provided as follows:
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> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
>
> (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial.

Section 18(2) and (3) of the Courts of Judicature Act 1964 provides:

> Section 18(1)
>
> (1) ...
>
> (2) Whenever any Judge, after having heard and recorded the whole or any part of the evidence in a proceeding, is unable through death, illness or other cause to conclude the proceeding, another Judge may –
>
> (a) continue with the proceeding from the stage at which the previous Judge left it and –

A (i) act on the evidence already recorded by the previous Judge; or

(ii) act on the evidence partly recorded by the previous Judge and partly by himself; or

or

B (b) resummon the witnesses and recommence the proceeding.

(3) Where the Judge acts under subsection 2(a)(i) he may, either on his volition or at the request of any party to the proceeding, recall any of the witnesses as in respect of any part of the evidence already recorded, or he may take their evidence afresh:

C Provided that in respect of a criminal proceeding, the Court of Appeal and the Federal Court may, on appeal, set aside any conviction had on evidence not wholly recorded by the Judge before whom the conviction was had if such Court is of the opinion that the accused had been materially prejudiced thereby, and may order a new trial.

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[65] The two provisions clearly provided that if the accused had been materially prejudiced by the decision of the trial magistrate/judge in convicting him based on evidence not wholly recorded by the convicting magistrate/judge E the appellate court may set aside the conviction and order a new trial. As such the issue in this appeal is whether the appellant had been materially prejudiced by the refusal of Justice Ahmad Nasfy to hear the case de novo after he took over the hearing of the case from his predecessors.

F **[66]** In the instant case when the application for the case to be heard de novo was made, the evidence of 17 out of 18 witnesses for the prosecution had been heard by the court. The offences took place on 5 July 2005 and the first witness for the prosecution gave evidence on 3 September 2008. The application for the case to be heard de novo was only made on 8 August 2012, which was about G seven years after the commission of the offences. Under the circumstances we are of the view that after a lapse of seven years the ability of the witnesses might have diminished and to recall all the witnesses after seven years would cause unnecessary hardship to the prosecution in relocating those witnesses as well as it would be unfair to those witnesses. In addition it would unnecessarily H prolong the trial and increase the expense.

[67] The prosecution case rested entirely on circumstancial evidence. Five of the prosecution witnesses were civilians. SP5 testified that she knew the deceased Khong Poh Chooi because the deceased and her worked with Alice I Academy, Taiping between 2004–2005. She was not cross-examined by the defence counsel. The other two civilian witnesses, PW6 and PW7, were briefly cross-examined by the defence counsel. SP10 (Mok Choy Leng) and SP11 (Kong Chiew Leong) testified that they knew the two deceased. Their testimonies were short and they were not cross-examined by the defence

counsel. There were no contradictions in the evidence of these five witnesses. Their credibility was not an issue. This is supported by the fact that in his appeal to the Court of Appeal the appellant did not raise any issue on the credibility of these witnesses.

[68] Nine of the prosecution witnesses were police officers, two were the government chemists and the other two were the consultant forensic pathologist and the assistant medical officer. Again, their credibility was not an issue before the Court of Appeal. The only issues raised in the appeal before the Court of Appeal were as follows:

(a) the trial judge erred in shifting the burden of proof on the appellant;

(b) the trial judge failed to consider the evidence of the pathologist (PW17) that there was a possibility that two persons were involved in the case;

(c) the trial judge failed to consider the investigation done on the appellant and the failure of the police to disclose the result of the investigation;

(d) the issue on the specimen of the appellant's handwriting;

(e) failure to call a witness by the name of Yohana; and

(f) the exh P24 (the bag) was not sent for DNA analysis.

[69] Since the credibility of the prosecution witnesses was not an issue in this case Justice Ahmad Nasfy could rely on the cold hard print of the evidence of the material witness es recorded by his predecessors to decide the case and there was no necessity for the case to be heard de novo by him. The evidence put forth by the prosecution was rather straightforward and clear. There were no material inconsistencies or contradictions in the witnesses' evidence. Under the circumstances and on the facts of this case we find that the appellant had not been materially prejudiced by the failure of Justice Ahmad Nasfy to hear the case de novo. The appellant's contention on this point is therefore devoid of any merit.

[70] On the totality of the evidence adduced, we find that the High Court was correct in calling for the appellant to enter upon his defence to both the charges. We are also of the considered view that the High Court was correct in convicting the appellant on both charges after the court had evaluated all evidence before the court. In the circumstances we find the convictions are safe.

[71] For the reasons given the appellant's appeal is dismissed. The convictions and sentences are therefore affirmed.

A *Appeal dismissed and convictions and sentences affirmed.*

Reported by Ashok Kumar

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